Supreme Court, U.S.
FILED

No. 10-853 NOV 5 - 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JACOB ZABARA,

Petitioner,

vs.

HARRY M. BYRNE, JR. and BLANK ROME LLP,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania Eastern District

PETITION FOR WRIT OF CERTIORARI

JACOB ZABARA
300 South Pointe Drive, #2002
Miami Beach, FL 33139
(305) 538-2601

QUESTIONS PRESENTED

Question 1 The Property Settlement section of the Divorce Agreement is unconstitutional in relation to the Constitution which states under Section 8 (Powers of Congress) "To promote the Progress of Science and Useful Arts, by securing for limited times to authors and inventors the exclusive right to their respective Writings and Discoveries" and Congress has erected laws and a patent office to assure these rights which have made intellectual property a cornerstone of modern industry and technology.

The Divorce Agreement did not explicitly state the existence of 6 other patents resulting in loss of their rights; and two other patents for which I have put about $1.2 Million Dollars in escrow to date.

Was it incumbent upon Byrne and Blank Rome to obtain the advice of a patent attorney whose services I agreed to pay, and which they did not do?

Question 2 Were Harry Byrne and Blank Rome correct in preventing me from giving testimony (and educating) the Court about the patents? For example, they refused to allow me to be present at the hearing, but sat me outside, only to be there to initial and sign the Agreement.

Question 3 Were Harry Bryne and Blank Rome correct in allowing the Court to act based on the Agreement, confused by deletions, additions, crosshatchings, etc., even before I received the clean version, which was signed, of course, by the opposition, but not by me?

QUESTIONS PRESENTED – Continued

Question 4 Was the Lower Court (Montgomery County, PA) correct in giving away rights to my patents? Further, was the Court correct in denying my right to defend myself, based on my not furnishing a document (which did not exist)?

Question 5 Is it incorrect for Harry Bryne and Blank Rome to have set aside from consideration the significant information they had about Cyberonics and the clinical trials, involving a lengthy article in the Sunday paper of the Philadelphia Inquirer highlighting me and physicians and patients?

Question 6 Were Harry Bryne and Blank Rome negligent in preventing me from defending my rights to my patents? Harry Byrne prevented me from entering the chamber where the case was discussed, but instead he came to me a number of times from the chamber and told me to initial the pages which were crossed out lines and with added or changed statements, and then told me to sign. He told me I would be sent a clean copy which I would have time to study, and then if I agreed, to sign. I did not sign the clean copy, but Harry Bryne had already, unknown to me, entered the original as official.

Question 7 Is it correct for Harry Bryne and Blank Rome to have ignored my License Agreement with Cyberonics which necessitated initial development by myself in terms of both effort and funding? This resulted in their culpability in the potential damage to thousands of patients.

QUESTIONS PRESENTED – Continued

Question 8 Were Harry Bryne and Blank Rome negligent in accepting a neutral patent attorney, and his report, Bramson, who was neither neutral nor competent (in this area)? Bramson had served as patent attorney expert previously with the opposition firm, Asfor Weiss Kaplan & Rosenblum, and now Bramson is serving as an expert witness against me for the same firm, Asfor Weiss Kaplan & Rosenblum, in the case in the court of Common Pleas of Montgomery County, PA.

Question 9 Were Harry Bryne and Blank Rome professionally incompetent in misleading me and misrepresenting the Agreement for my signature? I was told by Harry Byrne that I would be called into the hearing in a little while. I was never called into the hearing, but instead Harry Byrne came out to me periodically and told me to initial the top of pages in the Agreement, in which changes, deletions, etc. had been extensively made. Finally, he came to me and told me to sign the Agreement. I told him that I needed a clean copy, without the deletions, etc., in order for me to sign competently and understand adequately. Harry Byrne told me I would have a clean copy for me to read and understand, but, in the meanwhile, my signature was necessary for the changes. I received a clean copy but I did not sign it, and learned that Harry Bryne and Blank Rome had submitted the original rough copy for the Judge to approve, which he had done.

Question 10 Was the Superior Court of Pennsylvania correct in denying my appeal because of the ten day limit for filing of pre-motions? For a period of many

QUESTIONS PRESENTED – Continued

months I demonstrated to the Superior Court that it was impossible for me to meet the 10 day limit, yet they ignored the evidence and granted Harkins Cunningham (the attorneys for Harry Byrne and Blank Rome) the argument.

Question 11 Was the Supreme Court correct in holding me to a thirty day limit for the appeal (and not including the time I appealed (petitioned) the Superior Court's denial)? Why is there such a high standard for a merely technical rule?

Question 12 Were Harry Bryne and Blank Rome negligent in not protecting my son, Daniel, and Haverford College against the suit brought against them by Jerrold Schorr, Esq. and Elizabeth Omand for my son's transcripts, etc? This suit brought such anguish to my son that he was forced to withdraw from his major (pre-med) and he eventually dropped out of college.

Question 13 Were Harry Bryne and Blank Rome negligent in not assuring that the License Agreement was in the courthouse file? The License Agreement determined the royalty and patent conditions which were the basis of the Property Settlement Agreement. The License Agreement should have been in the file, but it does not appear (see Prothonotary letter).

Question 14 Was the only License Agreement shown to the Court, the one that was markedly altered (almost 10 pages less than the true License Agreement) shown by the opposition attorney, J. Schorr, Esq?

QUESTIONS PRESENTED – Continued

Question 15 Was it incorrect for the Divorce Agreement to call my payments (of royalty) as alimony or in the nature of alimony? Was it correct to extend these payments, beyond my death, to my estate? Because the IRS could not consider them as tax deductible. Was it incorrect for the Divorce Agreement to state that I would not owe taxes on these payments?

Question 16 Is it really this difficult to obtain a competent attorney to sue another attorney or firm (malpractice), or is this simply my personal experience?

Question 17 Is it proper for the Judge to dismiss three of my four charges without telling me or the Jury, nor did my attorney tell me.

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

John G. Harkins, Jr.
Eleanor Morris Illoway
David W. Engstrom
Harkins Cunningham LLP, representing:

Harry M. Byrne, Jr. and Blank Rome LLP,
Respondents.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[ ] reported at ; or,

[ ] has been designated for publication but is not yet reported; or

[X] is unpublished.

The opinions of the Pennsylvania Supreme and Superior Courts appear at Appendix A, B and D to the petition and is

[ ] reported at ; or,

[ ] has been designated for publication but is not yet reported; or

[X] is unpublished.

JURISDICTION

The date on which the highest state court decided my case was August 11, 2010. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States,
Section 8 – Powers of Congress

"To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

STATEMENT OF THE CASE

The preliminary element of this case is its unconstitutionality; i.e., that rights to my patents were taken away from me. This could have serious consequences for individual inventors such as myself. It could also have significant negative consequences for corporations whose intellectual property constitute the basis of their operation and production. The courts I have been involved with seem to have very little sense of this or even the constitutional right pertaining to patents. Harry Bryne and Blank Rome

should never have put me in the position where I could be ordered by the Court to give away my rights to my patents. The royalties validate the constitutional and legal rights pertaining to a patent, and underscore its usefulness. The method to obtain rights to a patent (and royalties) is to petition the Patent Office, which was not done.

On page 4 of the Court Order (Court of Common Pleas, Montgomery County, PA, 8/3/05) I am required to pay a significant percentage of my royalties to Elizabeth Omand as if she had contributed to the patents, written some of the claims, etc., or done work related to the patent, which she had not, nor presented any evidence she had. And she claimed royalty rights (patent rights) as she had (see tax return in Appendix E). Did the Judge have the discretion to do this in the face of constitutional and congressional law protection? At the hearing, the Judge prohibited me from testifying or presenting a witness who was competent in such law. The basis of the Judge's discretionary power was that I was unable to present a document from Cyberonics (to which my patents were licensed), which described my distribution of royalties between different patents. Such a document does not exist and cannot be done. About 2½ years ago, I was able to obtain a document from Cyberonics which addressed the problem, but the Judge has not yet acted upon it. Meanwhile, Elizabeth Omand and her attorney Gerald Schorr have claimed rights to two more of my patents and I have had to put this money in escrow, and have been waiting two years for a hearing which is still not scheduled. Elizabeth

Omand repeatedly demanded rights to the patents because she had raised "my" children, even though she has not spoken to these children for eight years.

Rights to my patents have been taken away from me based upon legal procedures which have ignored these rights given under the Constitution and implemented by Congress (laws). This action, if extended, could result in serious consequences for our economy and social well-being. A brief summary of what happened is as follows: Under the advice and pressure of my attorney, Harry Bryne (Blank Rome), I signed a confusing Property Settlement Agreement on the condition I would receive a clean and non-confusing Agreement in a few weeks for a "true" signing. Meanwhile, my attorney and the opposition attorney had the Court validate the "rough" Agreement, even though I did not sign the "clean" Agreement when it arrived. The Lower Court ruled that I had given my ex-wife the rights to 20% of four patents, and owed her 20% of my royalties, even though I am the only inventor on these patents, and she admitted she had done no work on these patents. In addition, these patents were initiated and issued, after our separation. Our separation resulted from her desire to marry another man with whom she was having an intimate relationship. Harry Bryne refused my repeated demands to have an independent patent attorney to inform the Judge about my patents and my rights thereto. Instead, he agreed with the opposition attorney (Schorr) to have a "neutral" patent attorney, who was not neutral, but began with the assumption of Schorr that my ex-wife had rights to

my patents. At the hearing the Judge sided with Schorr and did not let me testify or bring witnesses because I had not supplied a document delineating the royalties from my separate patents. So my ex-wife obtained the rights to my patents (and so states her right to the royalties on her IRS return).

All the experiments that were the basis of the patents (and the patent applications initiated) were performed following the separation (July, 1984), and the divorce initiated by the wife (November, 1984). Most of the experiments were performed at the University of Washington (Seattle) in the Department of Neurosurgery laboratory, under contract (1985-1987). In 1988 I was co-founder of a company, Cyberonics, in Houston, Texas to develop and market this new treatment for epilepsy, which was subsequently approved by the FDA for refractory epileptic patients. Cyberonics began with six employees and now has almost 500 employees in clinical, engineering, marketing, etc., departments. There are approximately 66,000 patients at present (in the U.S. and worldwide), who have this treatment. Royalties on my patents is what I receive (with a very small consultancy fee). My ex-wife receives a significant percentage of these royalties (20%), simply because my attorney, Harry Bryne, and the firm Blank Rome illegally permitted it.

There are three patents stated in the Agreement where my rights were violated, and another patent which they are attempting to obtain even though they have not been able to show any evidence over three

years of discovery (and making me set up an escrow fund). The three so-called "marital" patents are not the only patents involved; altogether, there are nine U.S. patents (and several international patents) fundamentally involved. Two of these patents ("marital") expired in 2003, thereafter leaving a total of seven patents, only one of which is claimed as "marital" property. All of these patents were applied for, and issued long after, the separation (July, 1984).

In the Superior Court of Pennsylvania, Non-Precedential decision – see Superior Court I.O.P. 65-37, the document states: "Did the trial court abuse its discretion in failing to consider the License Agreement between Husband and Cyberonics in determining the percentage of the royalties attributable to the patent that was the subject of the parties' Property Settlement Agreement?" How is it possible that the Superior Court upheld the trial court's discretion? The trial court had no right under patent law or case history to make this discretion. The use of the trial court's "discretion" in this matter is unfounded and goes against years of enforcement of patent law (and its constitutional basis), and case history in patent infringement.

"The trial court next relied on the *Clark* case and indicated that its decision to draw an unfavorable inference is within its sound discretion and should not be reversed absent a manifest abuse of that discretion." There *is* a manifest abuse of discretion which the Superior Court did not even appear to understand. The Superior Court did not appear to

comprehend that the trial court was denying me a fundamental right given by the constitution. The Property Settlement, as developed by Harry Bryne and Blank Rome and the opposition attorneys was incorrect, and even illegal, in giving away my right, that even I could not give away. I invented this unique medical therapy and developed the technology and pursued the patent, which was initiated after the separation, and no one else was the inventor. No one else has a right to the patent unless they have demonstrated a right to the invention which the patent office approves. Royalties are given only for a demonstrated right to the patent. The action of the trial court and Superior Court is an abuse of their power. This not only has seriously affected me, but has possible serious consequences for industries dependent on their intellectual property. It has also possible serious consequences for 66,000 patients at present, and more in the future, dependent on this medical therapy.

This petition was made initially (in forma pauperis) because it was not possible to obtain an attorney, at least before the deadline (Nov. 8, 2010), and a critical document had to be photocopied, instead of reprinted, so that the extensive financial questionnaire is not applicable. It is probable that an attorney was not obtainable in any event, because of the known difficulty of obtaining an attorney to sue another attorney (malpractice), which was my original problem, taking me more than a year to obtain such for the original trial. And when this attorney

resigned (withdrew) immediately after the jury's verdict, I was late and rejected for this on my appeal. It seems to be unfair when attorneys sue physicians so readily and willingly for malpractice, that attorneys refuse to sue other attorneys, which is the usual case. Also, a critical document had many deletions, hand written additions, etc, which had to be photocopied. So that the format in which every document had to be reprinted on special sized paper (which I was unable to obtain), was not possible for me. I particularly request your indulgence in this and am now petitioning in the booklet format.

In response to Harkins Cunningham document of December 31, 2009 (No. 3249 EDA 2009) to Superior Court of Pennsylvania, I object to this document as essentially addressing the same issue as the Order I responded to with the Court. I do not know whether this document (Harkins Cunningham) is procedurally incorrect (as to time and content), but it is certainly unfair. Harkins Cunningham is arguing their side of the case before the case even exists, to prevent it from existing. Harkins Cunningham had all the information discussed at the private hearings with the Judge, and I had virtually none. I was disallowed presence at these hearings while Harkins Cunningham often had three attorneys present. It was at these hearings that the motions were discussed and I knew nothing about them until I received some transactions many weeks after the verdict. Is it reasonable that they tell me at this late date that they are going to make an issue of the motions? Is it

reasonable for Harkins Cunningham to use a rule designation different from that of the Court for the same issue (motions) without explaining it? Harkins Cunningham is giving the appearance of obstructing my right to defend myself in a court of law. Harkins Cunningham conveys an erroneous impression that I had the information from the hearings they had with the Judge, throughout the trial. Harkins Cunningham was fully aware that I was not allowed access to these discussions with the Judge.

I do not believe that their obstruction has been deliberate, but rather is based on their confusion concerning my patents, the License Agreement relating to them, the medical treatment, and royalties. The transcript of their discussions with the Judge, of which they presented an excerpt (letter of Dec. 31, 2009), demonstrates this confusion. The License Agreement shows the royalties are based on the Product (medical treatment). There are presently seven patents related to the Product and its sales. Only one of these is mentioned in the Divorce Agreement. Notwithstanding these facts, my ex-wife obtains 18% of my royalties. The License Agreement is central to the case, but was not included with the Decree (as mandated), or the Divorce Agreement, nor does it appear in the Court File (see enclosed Letter), thereby adding to the confusion.

I received a letter of January 22, 2010 (Superior Court of Pennsylvania) and asked to reconsider its refusal of my appeal to include my previous two

responses (from the Court and Harkins Cunningham involving my License Agreement from Cyberonics and its absence in the Montgomery Court File on my case. The Court apparently accepted the arguments of Harkins Cunningham for dismissal of my appeal which are primarily based on the ten day limit (from verdict), for preservation of motions. My response demonstrates that my case is very different from the cases quoted to support this limit. I do not believe, given the nature and actions in my case, that it was reasonably possible to have responded within ten days.

If I may, I will assume the following rationale for the ten day limit for the motions. It would give sufficient time for attorney and client to review the trial and mutually determine whether an appeal is appropriate. In addition, it would give time for consideration as to which motions were to be preserved. In my case there was no review of the trial with attorney, nor did he tell me of the ten day limit. Immediately after the verdict in Court, my attorney stated "there is no basis for appeal" and refused to discuss it further.

I was not allowed into the discussions (and was not told about them), where the Judge rejected the critical motions. The transcripts of these discussions show that my attorney appeared to be confused and Harkins Cunningham took advantage of this. The one person in the jury selection who knew about patents was rejected by Harkins Cunningham. The Judge did not appear to be sufficiently acquainted with patents

to instruct the jury in this regard but simply stated " . . . this is not a case about patents." The patent expert for Harkins Cunningham was allowed to be a witness, but mine was not. The critical issue in the Divorce Agreement, as the basis for my payments to my ex-wife, is three patents and exclusively limited to those patents, but her payments include many more patents, to which she has no entitlement.

Harkins Cunningham claims that my age and residency are irrelevant, which I do not believe is true. I am due consideration as a senior citizen where rights have been denied me. I had three separate days of interrogation (depositions), and my attorney said "they are trying to break you down." As an example, Ms. Illoway interrupted my testimony and told my attorney to take me to Walgreen's and buy me a pair of glasses, otherwise this would take all day. Having not been a resident of Pennsylvania for 12 years, I cannot be expected to know Pennsylvania law. This is the same rationale as the obligation to obtain an attorney who has a Pennsylvania license.

Harkins Cunningham state that "Zabara was represented by counsel at trial and throughout the pretrial proceedings." This is exactly the point, that after more than a year attempting to find an attorney to do this, that he did represent me and I had to spend extensive time, effort and significant expense involving his fee, expert witness, videotaping, etc., and then his refusing to appeal (without withdrawing).

REASONS FOR GRANTING THE WRIT

I attempted to appeal shortly after the verdict, but the appeal documents were returned by the Court, stating that I had to wait for the Judgment. After the Judgment, I re-appealed and documents were sent to me to complete which included a segment on which there were motions to preserve. I did this within the stated time limit. I had been told that my case (appeal) had been docketed, and I saw no reason to believe I had missed any previous time limit.

Enclosed is a portion of my ex-wife's tax return (1040), claiming that my payments to her in 2007 as "Royalties received," which is contrary to patent law (constitution). This is another example of the serious problems with the Divorce Agreement.

Please ignore the following if it is inappropriate, but I feel obligated to mention it. It is another aspect of Harkins Cunningham claiming that my age of 77 is irrelevant. I have been sued for 25 years by my ex-wife and her attorney where I had to spend an average of about 35% of my time. Our children and thousands of people with epilepsy and depression have been negatively affected by this case. I have written this to my ex-wife and her attorney, and told them, but they ignored this serious problem and my ex-wife has not spoken to our children for seven years. She refused during the marriage and afterwards to help, even though she has a doctorate, like myself, from the University of Pennsylvania. I could have completed the improvements in the medical treatment 15 years ago if it had not been for this

intransigence. As an example, while I was doing a special project for children in Israel, Harry Bryne resigned as my lawyer, and my ex-wife and her attorney immediately froze my assets, and I had to return to the U.S. and the project terminated with many children not receiving a free medical treatment which their parents could not pay for. This delayed the FDA approval for several years for children everywhere with epilepsy. There is also the dilemma created by this in relation to jobs. When I began, we had six employees; now there are about 500.

The process, or rules of procedure, and technical aspects are primarily initiated to concentrate and illuminate the hard evidence relevant to the case. In my case, contrary to this intention, the rules have dominated, basically to "rule out" the evidence. The intention to focus on the motions is weakened by an arbitrary time limit immutable for all cases, no matter what.

From the Supreme Court of Pennsylvania, I received a letter of March 29, 2010. Although the order is January 22, 2010, my business concluded on March 16, 2010, which I assumed to determine my appeal time period. The Prothonotary office (Superior Court) told me it could not tell me the appeal time period because it could not give me legal advice. I believe that without specific information, my assumption was a reasonable one, and am including documentation to support this position.

An order was filed in Case No. 3249 EDA 2009 by the Superior Court on January 22, 2010, stating that no issues have been preserved for appellate review, so that appellee's motion to dismiss is granted. On March 16, 2010, an Order by the Court stated that appellant's motion for relief, i.e., reconsideration of this Court's Order of January 22, 2010, see *Zabara v. Byrne*, Case No. 3249 EDA 2009 (Pa. Super. Jan. 22, 2010) is DENIED.

In denying right to an appeal, the Superior Court quotes a rule defining a ten day limit. Enclosed are my responses to the arguments of Harkins Cunningham, which apparently the Court accepted. Briefly, the sequence of events are as follows. When the jury gave its verdict, my attorney stated that he would not appeal. I had not been a resident of Pennsylvania for 14 years, and it had taken me 1½ years of difficult searching to find him. I thought I had thirty days to file an appeal. When I filed an appeal with the Superior Court, everything was returned to me by the Court with the statement that I had to wait until the Judgment was entered. The Judgment took about another month where I checked almost every day. During this entire period, the Court did not inform me that I had missed a ten day deadline. Did the Court or my attorney have the responsibility for telling me, or was it something I should have picked up somehow? I tried to explain to the Court why Pa. RAP 227.1(c)(1) was not relevant to my case. First, I did raise these motions when the Court told me to do so, and within a 30 day period following the verdict,

and the Court returned these to me stating that I had to wait for the Judgment. Second, the rule, as stated, did not seem to apply to me. Third, the cases stated in the Order (January 22, 2010), were very different from my case. Fourth, my attorney resigned and gave me no information about the motions, which were primarily discussed in the Judge's chamber, out of my hearing or presence. Fifth, I had assumed a 30 day limit following the verdict, which I feel was reasonable based on this often used deadline. Sixth, the Clerk of Court could not give me this information stating that they were not attorneys. I believe the enclosed documents support my arguments. In addition, the February 19, 2010 letter from the Court insisted I serve a copy upon the opposing party, but I received nothing from the opposing party, but a final Order on March 16, 2010 from the Court.

An evidentiary trial will be held shortly at which I am at serious risk to pay about a million dollars. This trial was originally scheduled about three years ago and has been postponed repeatedly by the opposition for discovery, which includes subpoenas, etc. This has in addition necessitated significant expense for legal fees, etc. My serious risk and damage results from the incompetent Agreement drawn up by my attorney and Blank Rome and their methods to misrepresent to me this Agreement for my signature. The enclosed documents include the Judge's Orders for escrow in the claim for a patent *outside* the Agreement. I am not a corporation and cannot develop these patents to their full benefit for the patients

(presently about 60,000), and others, during the onslaught of this case which has lasted for 26 years. It is unconstitutional to claim rights to my patents. Blank Rome and Harry Byrne should compensate me as soon as possible to partially reverse the damages.

I felt compelled to appeal because of the import to inventors, corporations based on intellectual property, and technological development. Very few individual inventors (perhaps less than 1%) have significant success in the sense that their patents are developed into important technology. And yet, these few determine technological breakthroughs far beyond what their numbers alone would suggest: start-up companies, jobs, pioneer technology, new medical treatments, etc. Benjamin Franklin and Thomas Jefferson envisioned this technological future when they insisted on including rights and patent protection in the Constitution, empowering Congress to erect laws and the Patent Office. The decisions and actions of Harry Byrne and Blank Rome, and the lower courts are in direct conflict with the protection of inventors stated in the Constitution, and promulgation of these actions could seriously damage our country and its economy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB ZABARA

Originally filed: November 5, 2010

Resubmitted: December 29, 2010

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

JACOB ZABARA, Petitioner v. HARRY M. BYRNE, JR., AND BLANK ROME, LLP, PREVIOUSLY KNOWN AS BLANK ROME COMISKY & MCCAULEY, Respondents	:	No. 65 EM 2010

ORDER

PER CURIAM

AND NOW, this 11th day of August, 2010, the Petition for Leave to File a Petition for Review *Nunc Pro Tunc* is **DENIED**.

APPENDIX B

Jacob Zabara	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
V.	:	(C.P. Phila. Cnty. No. 605 December Term, 2006)
Harry M. Byrne, Jr., et al.	:	No. 3249 EDA 2009 Filed: March 16, 2010

ORDER

Appellant's motion for relief, i.e., reconsideration of this Court's order of January 22, 2010, ***see Zabara v. Byrne,*** No. 3249 EDA 2009 (Pa. Super. Jan. 22, 2010), is **DENIED**.

Per Curiam

APPENDIX C

HARKINS CUNNINGHAM LLP

By: John G. Harkins, Jr.
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(Pa. I.D. No. 40632)
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Attorneys for
Defendants
Harry M. Byrne, Jr.
and Blank Rome LLP

[SEAL]

Filed and
Attested by
[PROTHONOTARY
30 SEP 2009 12:01 pm
M. MATTIA

Jacob Zabara Plaintiff, v. Harry M. Byrne, Jr. and Blank Rome LLP, *previously known as* Blank Rome Comisky & McCauley Defendants.	PHILADELPHIA COUNTY COURT OF COMMON PLEAS DECEMBER TERM, 2006 CIVIL ACTION NO. 00605

PRAECIPE TO ENTER JUDGMENT

TO THE PROTHONOTARY:

Please enter judgment in favor of defendants Harry M. Byrne, Jr. and Blank Rome LLP pursuant to Pa. R.C.P. 227.4(1)(a). Judgment should be entered because in April 2009 the Court entered a nonsuit as to three of four of plaintiff Jacob Zabara's claims in this case and a jury returned a verdict for defendants on the remaining claim. Plaintiff did not file a motion for post-trial relief pursuant to Pa. R.C.P. 227.1.

This case involved four claims (Count I-IV) against defendants for malpractice arising out of a property settlement agreement. It was tried to a jury beginning on April 27, 2009. Plaintiff rested his case on April 29, 2009. A nonsuit pursuant to Pa. R.C.P. 230.1 was then granted on two of plaintiff's claims – for negligence and breach of contract relating to an alleged failure to include an allocation provision in the property settlement agreement (Counts III and IV). (*See* April 29, 2009 Tr., Morning Session, at 89-91, attached hereto at Tab 1.)

Defendants rested their case on April 29, 2009. Thereafter, plaintiff voluntarily dismissed Count II of the Amended Complaint, which asserted a claim for malpractice on the grounds of breach of contract. The Court granted a nonsuit pursuant to Pa. R.C.P. 230 on that claim. (*See* April 30, 2009 Tr. at 3-4, attached hereto at Tab 2.).

The remaining claim (Count I) – a claim against defendants for malpractice on the grounds of negligence – went to the jury. On April 30, 2009, the jury entered a verdict for defendants on that claim and found that defendants were not negligent in their representation of plaintiff. (*See* April 30, 2009 Tr. at 154-155, attached hereto at Tab 2.) Notice of the verdict pursuant to Pa. R.C.P. 236 was given to the parties on May 4, 2009. (*See* Trial Work Sheet docketed on May 4, 2009, attached hereto at Tab 3.)

Plaintiff did not file a timely motion for post-trial relief. Accordingly, the Prothonotary is permitted to enter judgment upon the praecipe of a party pursuant to Pa. R.C.P. 227.4(1)(a).

Dated:
September 30, 2009

Respectfully submitted,

s/ Eleanor Morris Illoway
John G. Harkins, Jr.
(Pa. I.D. No. 04441)
Eleanor Morris Illoway
(Pa. I.D. No. 40632)
David W. Engstrom
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Attorneys for Defendants
Harry M. Byrne, Jr. and
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Of Counsel:
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BLANK ROME LLP
One Logan Square
130 N. 18th Street
Philadelphia, PA
19103
Tel: (215) 569-5500

JUDGMENT and DISMISSAL WITH PREJUDICE on plaintiff's claim for malpractice on the grounds of negligence in Count I of the Amended Complaint is hereby entered pursuant to the jury verdict in favor of defendants Harry M. Byrne, Jr. and Blank Rome LLP and against plaintiff Jacob Zabara. JUDGMENT and DISMISSAL WITH PREJUDICE on plaintiff's claims for malpractice on the grounds of negligence and breach of contract in Counts II, III, and IV of the Amended Complaint is hereby entered pursuant to the grant of a nonsuit by the Court in favor of defendants Harry M. Byrne, Jr. and Blank Rome LLP and against plaintiff Jacob Zabara.

_____

Prothonotary

Dated: _____

[Certificate Of Service Omitted In Printing]

[SEAL]

Filed and Attested by
PROTHONOTARY
30 SEP 2009 12:01 pm
M. MATTIA

TAB 1

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

JACOB ZABARA : DECEMBER TERM, 2006

v. :

HARRY M. BYRNE, JR., ET AL : NO. 000605

APRIL 29, 2009
MORNING SESSION
COURTROOM 425 – City Hall
PHILADELPHIA, PA.

BEFORE:

HONORABLE JOSEPH A. DYCH, AND A JURY

[2] APPEARANCES:

FOR THE PLAINTIFF(S):

STEPHEN R. BOLDEN, ESQUIRE

FOR THE DEFENDANT(S):

JOHN G. HARKINS, ESQUIRE
ELEANOR M. ILLOWAY, ESQUIRE
DAVID W. ENGSTROM, ESQUIRE

OFFICIAL COURT REPORTER:

MICHELLE PALAMARCHUK, RPR.
215-683-8011

* * *

[89] projections so I really don't need to put that in.

MS. ILLOWAY: That's fine. I don't think all of Dr. Zabara's handwritten letters were published but I don't personally have an objection.

THE COURT: They are in.

MR. ENGSTROM: Steve, what about the Omand deposition?

MR. BOLDEN: We should offer that into evidence as P-97.

MS. ILLOWAY: I thought you just called something P-97.

MR. BOLDEN: I apologize. P-98.

THE COURT: Any objection?

MR. HARKINS: No, Your Honor.

THE COURT: All the exhibits are admitted. The plaintiff's case is closed.

I'll hear motions.

MR. HARKINS: Your Honor, I want to do this in two stages. This is an oral motion under you Rule 230 for a [90] nonsuit. First, in the complaint at counts three and four are claims for negligence and breach of contract relating to the failure back in '94 to put an allocation provision into the property settlement agreement.

I believe those claims have been now abandoned. There certainly is no testimony from Ms. Kolodner.

There is no damages attributed to that and I therefore ask that Your Honor nonsuit those two claims.

THE COURT: Response.

MR. BOLDEN: She did absolutely testify to the fact that there should have been an allocation. I believe she did.

THE COURT: I don't remember it.

MR. HARKINS: I don't remember it, either.

THE COURT: My recollection of her testimony is when you asked her in what ways has he violated the standard of care she said that it [91] wasn't marital property and it should have been litigated and that the alimony thing --

MR. HARKINS: Tax issue.

THE COURT: That the alimony provision was, did not reflect the law, the tax law. And I might note that since no harm has been alleged as a result of that, that's a no-harm/no foul. I don't think that can go forward.

Sir.

MR. BOLDEN: I agree with you. If there is no harm there can be no claim.

THE COURT: All right. I'm granting the compulsory nonsuit as to those two counts of the complaint.

Proceed.

MR. HARKINS: Now, I have two grounds with respect to Counts One and two. Count One is negligence for failure to have striped-out marital property.

* * *

TAB 2

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

JACOB ZABARA	:	DECEMBER TERM, 2006
v.	:	
HARRY M. BYRNE, JR., ET AL	:	NO. 000605

APRIL 30, 2009
COURTROOM 425 – City Hall
PHILADELPHIA, PA.

BEFORE:

HONORABLE JOSEPH A. DYCH, AND A JURY

APPEARANCES:

[2] FOR THE PLAINTIFF(S):

STEPHEN R. BOLDEN, ESQUIRE

FOR THE DEFENDANT(S):

JOHN G. HARKINS, ESQUIRE
ELEANOR M. ILLOWAY, ESQUIRE
DAVID W. ENGSTROM, ESQUIRE

OFFICIAL COURT REPORTER:

MICHELLE PALAMARCHUK, RPR.
215-683-8011

[3] THE COURT: Let's go on the record for this. We are at a charging conference outside the hearing of the jury.

Our first order of business or at some point we are going to look at the record and formally admit the defendants' exhibits and hear any motions that they may have prior to closing, and then we are going to discuss the verdict sheet and the charge.

But counsel has raised preliminarily an issue concerning whether or not there should be an instruction charge on contributory negligence in the case.

It should be noted – I don't know if we made a record on this at the end of the day yesterday. The plaintiff indicated that he did not intend to move forward on a theory of breach of contract. And I am, therefore, granting a nonsuit on that [4] point. So the case will go forward simply on a theory of negligence.

MR. HARKINS: Count I.

MR. BOLDEN: I and II.

MR. HARKINS: No. Count II is contract.

THE COURT: So we'll go forward on tort only.

MR. HARKINS: Which is Count I.

THE COURT: Which is Count I.

Counsel, you wanted to talk about contributory negligence. I assume somebody wants a contributory negligence count on here. Maybe they should tell us why.

MR. ENGSTROM: Your Honor, we have – defendants have asserted contributory negligence in their answer as new matter. As you may know, contributory negligence is a defense and absolute bar under Pennsylvania law to a claim for legal malpractice.

Defendants believe there is

* * *

[154] at them before we take them back.

(RECESS)

(The following occurs in open court in the presence of the jury)

THE COURT: Your Honor, the jury and all parties are present.

Madam Foreperson, please state your full name and spell your last name.

THE FOREPERSON: Rosina Conches, C-O-N-C-H-E-S.

THE CRIER: Madam Foreperson have all or six out of seven agreed on a verdict?

THE FOREPERSON: We did. The verdict sheet for Jacob Zabara, the Plaintiff versus Harry M. Byrne, Jr. and Blank Rome LLP, December Term, 2006,

Number 0605, question number one: Were the defendants negligent in their representation of plaintiff?

[155] THE FOREPERSON: No.

THE CRIER: Please be seated. Jurors, do you all or six out of seven agree on the verdict just rendered by your foreperson?

THE JURY: Yes

THE CRIER: Your Honor, may the verdict be recorded?

THE COURT: Any objections to the recording of the verdict?

MR. BOLDEN: No, Your Honor.

THE COURT: The verdict may be recorded.

Ladies and gentlemen, you are now discharged from your function. I thank you very much form your service. I'll meet you personally across the hall in just a minute to say thanks in person.

You are now free to discuss this matter were anybody or with nobody depending on your own personal preferences and I want to thank you very, very much.

[156] There being no further business, this court is adjourned.

(Trial concluded; record closed)

TAB 3

COMMON PLEAS COURTS OF PHILADELPHIA
CIVIL LISTING SECTION
TRIAL WORK SHEET

Event: PRE TRIAL CONFERENCE at 01/13/2009 10:30 in CH-243 Scheduled: 12/15/2008 , JURY JC – MAJOR JURY-COMPLEX				
Judge's Name: [DYCH]		Signature: X [Illegible]		
Caption: ZABARA VS BYRNE JR ETAL				Case Type: 4L – MAL-PRACTICE – LEGAL
Term and Number: #0612-00605	If Consolidated: Term and Number(s)			
TRIAL DATE: [4/21/09]	ACTUAL: (✓) JURY ( ) NON-JURY	TOTAL AMOUNT	NUMBER OF DAYS [5]	DATE SHEET PREPARED [4/30/09]
Disposition Date: [4/30/09]				
FULL DESCRIPTION OF DISPOSITION (To Be Entered VERBATIM On The Docket): [Verdict for Defendants] **DOCKETED** MAY 04 2009 F. CLARK DAY FORWARD				

( ) DEFAULT JUDGMENT/COURT ORDERED
( ) DISPOSITIVE MOTION GRANTED
( ) DIRECTED VERDICT

( ) DISCONTINUANCE ORDERED
( ) DISCONTINUE/TRANSFER BINDING ARB

( ) FINDING FOR DEFENDANT
( ) FINDING FOR PLAINTIFF
( ) DAMAGES ASSESSED

( ) JUDGMENT ENTERED BY AGREEMENT
( ) JUDGMENT ENTERED

( ) JURY VERDICT FOR PLAINTIFF
(✓) JURY VERDICT FOR DEFENDANT
( ) MISTRIAL
( ) HUNG JURY

( ) NON-PROS ENTERED
( ) NON-SUIT ENTERED

( ) SETTLED PRIOR TO ASSIGNMENT FOR TRIAL
(TEAM LEADERS, only)
( ) SETTLED AFTER ASSIGNMENT FOR TRIAL
( ) TRANSFERRED TO OTHER JURISDICTION

( ) OTHER (EXPLAIN) _____

Plaintiff's Attorney(s):
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JOHN G. HARKINS, JR. HARKINS CUNNINGHAM LLP 1800 ONE COMMERCE SQUARE 2005 MARKET ST PHILADELPHIA PA 19103	PHONE # (215) 851-6700

APPENDIX D

Jacob Zabara	:	IN THE
	:	SUPERIOR COURT
V.	:	OF PENNSYLVANIA
Harry M. Byrne, Jr. et al	:	
	:	(C.P. Philadelphia County
	:	No. 605 Dec. Term, 2006)
	:	
	:	No. 3249 EDA 2009
	:	
	:	Filed: January 22, 2010

ORDER

Appellees, defendants below, have filed a motion to dismiss this appeal from the judgment entered on September 30, 2009. Appellant did not file post-trial motions within ten days following the entry of the verdict on May 4, 2009.

Pa.R.A.P. 227.1(c)(1) states that "[p]ost-trial motions shall be filed within ten days after verdict." Pa.R.A.P. 302(a) states, "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." ***See Chalkey v. Roush***, 805 A.2d 491 (Pa. 2002) (under Rule 227.1, a party must file post-trial motions at the conclusion of a trial in any type of action in order to preserve claims that the party may wish to raise on appeal); ***Lane Enterprises, Inc. v. L.B. Foster Co.***, 710 A.2d 54 (Pa. 1998) (Pa.R.A.P. 227.1 requires parties to file post-trial motions in order to preserve issues for appeal; if an issue has not been raised in a post-trial motion, it is waived for appeal purposes).

As no issues have been preserved for appellate review, appellees' motion to dismiss is hereby **GRANTED**.

Per Curiam

APPENDIX E

Form 1040 Department of the Treasury – Internal Revenue Service
U.S. Individual Income Tax Return 2007 (99) Use only – Do not write or staple in this space.

Label (See instructions on page 12.) **Use the IRS label.** Otherwise, please print or type. **Presidential Election Campaign**	L	For the year Jan. 1-Dec. 31, 2007, or other tax year beginning , 2007, ending , 20		OMB No. 1545-0074
	A	Your first name and initial	Last name	Your social security number
	B	ELIZABETH L.	OMAND	[Social Security Number Omitted]
	E	If a joint return, spouse's first name and initial	Last name	Spouse's social security number
	L			
	H	Home address (number and street). If you have a P. O. box, see page 12 [Home Address Omitted]	Apt. no.	You must enter ▲ your SSN(s) above. ▲
	E R E	City, town or post office, state, and ZIP code. If you have a foreign address, see page 12. WYNCOTE PA 19095		Checking a box below will not change your tax or refund
	▶	Check here if you, or your spouse if filing jointly, want $3 to go to this fund (see page 12) ▶ ☐ You ☐ Spouse		

Filing Status Check only one box.

1 ☒ Single
2 ☐ Married filing jointly (even if only one had income)
3 ☐ Married filing separately. Enter spouse's SSN above and full name here. ▶
4 ☐ Head of household (with qualifying person). (See page 13.) If the qualifying person is a child but not your dependent, enter the child's name here. ▶
5 ☐ Qualifying widow(er) with dependent child (see page 14)

Exemptions

6a ☒ **Yourself**. If someone can claim you as a dependent, do not check box 6a .....] ▶ **Boxes checked on 6a and 6b** 1
b ☐ **Spouse** ..... **No. of children on 6c who:**
c **Dependents:** (1) First name Last name | (2) Dependent's social security number | (3) Dependent's relationship to you | (4) ✓ If qual. child for tax cr. (see page 15)

- **lived with you**
- **did not live with you due to divorce or separation (see page 16)**

If more than four dependents, see page 15.

Dependents on 6c not entered above
Add numbers on lines above ▶ 1

d Total number of exemptions claimed 1

* * *

Income	17	Rental real estate, royalties, partnerships, S corporations, trusts, etc. Attach Schedule E ...	17	2,876,429

* * *

Amount You Owe	**76 Amount you owe.** Subtract line 72 from line 63. For details on how to pay, see page 60.	76	1,183,707

* * *

SCHEDULE E (Form 1040) Department of the Treasury Internal Revenue Service	**Supplemental Income and Loss (From rental real estate, royalties, partnerships S corporations estates, trusts, REMICs, etc.)** ▶Attach to Form 1040, 1040NR, or Form 1041. ▶See instructions for Schedule E (Form 1040).	OMB No. 1545-0074 **2007** Attachment Sequence No. 13

Name(s) shown on return ELIZABETH L. OMAND	Your social security number [Social Security Number Omitted]

Part I Income or Loss From Rental Real Estate and Royalties. Note. If you are in the business of renting personal property, use **Schedule C** or **C-EZ** (see page E-3). If you are an individual, report farm rental income or loss from Form 4835 on page 2, line 40.

1 List the type and location of each rental real estate property:	2 For each rental real estate property listed on line 1, did you or your family use it during the tax year for personal purposes for more than the greater of: • 14 days or • 10% of the total days rental at fair rental value? (See page E-3)	Yes	No
A ROYALTY PRINCIPAL PAYMENTS	A		

* * *

Income:		Properties A	B	C		Totals (Add columns A, B, and C)
4 Royalties received	4	2,985,262			4	2,985,262
Expenses:						
10 Legal and other professional fees	10	108,833				

* * *

26 Total rental real estate and royalty income or (loss). Combine lines 24 and 25. Enter the result here. If Parts II, III, IV, and line 40 on page 2 do no apply to you, also enter this amount on Form 1040, line 17, or Form 1040NR, line 18. Otherwise, include this amount in the total on line 41 on page 2.	26	2,876,429

APPENDIX F

ASTOR WEISS KAPLAN & MANDEL, LLP
BY: GERALD J. SCHORR, ESQUIRE
ATTORNEY FOR PLAINTIFF
I.D. NO. 42467
The Bellevue, 6th Floor
200 South Broad Street
Philadelphia, PA 19102
215-790-0100

ELIZABETH L. OMAND (ZABARA)	:	COURT OF COMMON PLEAS
v.	:	MONTGOMERY COUNTY, PA
JACOB ZABARA	:	NO. 84-17202

ORDER

AND NOW, this 3d day of August, 2005, upon consideration of Defendant's Petition for Reconsideration, filed 4/26/05, Plaintiff's Petition to Enforce, for Contempt and for Counsel Fees, Costs and Expenses (III), filed 4/28/05, Answer to Defendant's Petition for Reconsideration and Counter-Petition of Plaintiff, filed 4/28/05, Order Sur Defendant's Petition for Reconsideration dated 4/28/05, Defendant's Reply to New Matter and Answer to Counter-Petition for Reconsideration and Defendant's New Matter to Plaintiff's Counter-Petition for Reconsideration, and Defendant's Answer to Plaintiff's Petition to Enforce, for Contempt and for Counsel Fees, Costs and Expenses (III) and Defendant's Counter-Petition, and after due consideration of the oral arguments of the parties, it is hereby:

A. ORDERED AND DECREED THAT Defendant shall direct Wachovia Bank to issue a bank check from the money market acct. titled in the name of Defendant in which the sum of Three Million ($3,000,000) Dollars has been held under constructive trust pursuant to Order of this Court dated February 28, 2005, payable to Elizabeth Omand in the amount of Two Million Four Hundred Sixty Seven Thousand One Hundred Thirty-three Dollars and Nine cents ($2,467,133.09), said sum representing payment in full of the principal and interest due under the Order entered April 18, 2005, with payment to be sent to Plaintiff's attorney, Gerald J. Schorr, Esquire, Astor Weiss, Kaplan & Mandel LLP, 200 South Broad Street, Philadelphia, Pennsylvania 19102, and received by Plaintiff's attorney no later than thirty (30) days from the date of this Order;

B. FURTHER ORDERED AND DECREED THAT Defendant shall direct Wachovia Bank to issue a bank check from the money market acct. titled in the name of Defendant in which the sum of Three Million ($3,000,000) Dollars has been held under constructive trust pursuant to Order of this Court dated February 28, 2005, made payable to Gerald J. Schorr, Esquire, in the amount of Fifteen Thousand ($15,000) Dollars, said sum representing payment in full of the award for counsel fees under the Order entered April 18, 2005, which payment shall be sent to Gerald J. Schorr, Esquire, Astor Weiss, Kaplan & Mandel LLP, 200 South Broad

Street, Philadelphia, Pennsylvania 19102, and received by Plaintiff's attorney no later than thirty (30) days from the date of this Order;

C. FURTHER ORDERED AND DECREED THAT within thirty (30) days of the date of this Order, Defendant shall supply Plaintiff's attorney with proof of the amount of royalties received by him to date in calendar year 2005 and with proof of the date(s) of receipt of said royalties and, within the same said thirty (30) days, Defendant shall direct Wachovia Bank to issue a bank check from the money market acct. titled in the name of Defendant of which the sum of Three Million ($3,000,000) Dollars has been held under constructive trust pursuant to Order of this Court dated February 28, 2005, payable to Elizabeth Omand in the amount of Plaintiff's share of said royalties under the terms of the Property Settlement Agreement by and between the parties dated February 2, 1994, as incorporated but not merged into a Divorce Decree entered February 4, 1994 which payment shall be sent to Gerald J. Schorr, Esquire, Astor Weiss, Kaplan & Mandel LLP, 200 South Broad Street, Philadelphia, Pennsylvania 19102, and which payment shall be received by Plaintiff's attorney no later than thirty (30) days from the date of this Order. Upon receipt of payment in full of said sum, Plaintiff's attorney shall supply the Court with a proposed Order releasing said account from all terms and conditions of the Order dated February 28, 2005, and directing that

any and all remaining funds in said account belong to Defendant and are his to dispose of as he in his sole discretion may elect, a certified copy of said Order to be transmitted to Wachovia Bank upon receipt from the Court;

D. FURTHER ORDERED AND DECREED that for all additional royalties paid to Defendant ("additional" to include all royalties not received pursuant to para. C above), within thirty (30) days of receipt of said royalties, Defendant shall supply Plaintiff's attorney with proof of the amount of royalties and proof of the date of receipt of said royalties and, within same said thirty (30) days, Defendant shall pay to Plaintiff her share of said royalties under the terms of the Property Settlement Agreement by and between the parties dated February 2, 1994 as incorporated but not merged into the Divorce Decree entered February 4, 1994;

E. FURTHER ORDERED AND DECREED that Defendant's failure to make any and all payments in accordance with paragraph D above by the thirtieth (30th) day after his receipt of notice of royalties received pursuant to para. F below shall result in an accrual of interest owed at the rate of 6% simple, *per annum*, on the entire outstanding balance then due, and shall be deemed non-compliance by the Defendant of this Order, entitling Plaintiff to seek appropriate legal remedies, including but not limited to enforcement, contempt, and reimbursement of reasonable counsel fees,

costs and expenses in connection with the prosecution of said remedies by the Plaintiff;

F. FURTHER ORDERED AND DECREED THAT Wachovia Bank is hereby directed to provide Defendant with notification, by writing or otherwise, in accordance with the usual and customary business practices of Wachovia Bank, N.A., and the rules and regulations of the Pennsylvania Department of Banking, of the deposit into Defendant's account of royalty payments to Defendant.

G. FURTHER ORDERED AND DECREED that a certified copy of this Order shall be delivered to Wachovia Bank, N.A. at 700 Adams Ave., Philadelphia, Pennsylvania 19124, with a copy delivered to the headquarters of Wachovia Bank, N.A., attention corporate counsel, within three (3) days of the issuance of this Order and its entry upon the docket of this case.

BY THE COURT:

/s/ Rhonda Lee Daniele
J.

Copy of the above Order sent
to the following on 8/3/05:

Court Administration
Gerald J. Schorr, Esquire
Jack Rounick, Esquire

/s/ [Illegible]
Esquire

APPENDIX G

[LOGO]

COUNTY OF MONTGOMERY
COURT HOUSE
P.O. BOX 311
NORRISTOWN, PENNSYLVANIA
19404-0311

OFFICE OF THE
PROTHONOTARY
MARK LEVY
PROTHONOTARY
BONNIE O'KANE
FIRST DEPUTY

August 26, 2009

Jacob Zabara
300 S. Pointe Dr. #2002
Miami Beach, FL 33139

RE: Elizabeth L. Oman Zabara vs. Jacob Zabara,
Case Number 198417202

Dear Mr. Zabara,

As per your request of August 12, 2009, enclosed is a certified copy of the Decree and Order dated February 4, 1994 with Exhibit A, titled Agreement Between Elizabeth Omand and Jacob Zabara in the above captioned matter.

On the bottom of the Table of Contents of Exhibit "A" is listed:

Exhibit "A" – License Agreement
Exhibit "B" – Husbands Financial Disclosure
Exhibit "C" – Wife's Financial Disclosure

Please note that these documents were not attached to the Decree and Order and/or Exhibit "A" docketed on February 8, 1994 by our office.

Sincerely,

/s/ Bonnie O'Kane
Bonnie O'Kane
1st Deputy Prothonotary

APPENDIX H

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

ELIZABETH L. OMAND ZABARA	:	NO. 84-17202
VS.	:	IN DIVORCE
JACOB ZABARA	:	

DECREE AND ORDER

AND NOW, this 4 day of FEBRUARY 1994, the Court, by virtue of authority vested in it by law, decrees that **ELIZABETH L. OMAND ZABARA** and **JACOB ZABARA**, are hereby divorced from the bonds of matrimony, and all the duties, rights and claims accorded to either of the said parties at any time heretofore, in pursuance of said marriage, shall henceforth cease and determine, and the said parties shall severally be at liberty to marry again as if they had never been married.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pursuant to the Divorce Code of 1980, the terms, provisions and conditions of a certain property settlement agreement reached between the parties on February 2, 1994, and attached to this DECREE AND ORDER as Exhibit "A", are hereby incorporated into this DECREE AND ORDER by reference as fully as though the same were set forth herein at length. Said agreement shall not merge with but shall survive this DECREE AND ORDER.

BY THE COURT:

/s/ William R. Carpenter
J.

cc: Gerald J. Schorr, Esq.
Harry M. Byrne, Jr., Esq.

1984-17202-0049
Decree in Favor of
Montgomery County Prothonotary
William E Donnelly
Tuesday. February 08, 1994 12:00:00 AM

EXHIBIT "A"

AGREEMENT
BETWEEN
ELIZABETH OMAND
AND
JACOB ZABARA

GERALD J. SCHORR, ESQUIRE
Attorney for
Elizabeth Omand

HARRY M. BYRNE, JR., ESQUIRE
Attorney for
Jacob Zabara

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EXHIBIT "A" – LIC. AGREEMENT.
EXHIBIT "B" – HUSBAND'S FINANCIAL DISCLOSURE.
EXHIBIT "C" – WIFE'S FINANCIAL DISCLOSURE.

This Agreement is made in duplicate by and between ELIZABETH OMAND ("Wife") and JACOB ZABARA ("Husband") on February 2nd, 1994.

WITNESSETH:

A. Husband and Wife were married on February 27, 1970.

B. Two children were born to Husband and Wife, namely JOSEPH ZABARA born on March 10, 1971 and DANIEL ZABARA born on August 1, 1975, referred to as the Children.

C. Differences have arisen between the parties in consequence of which they are living separate and apart from each other, and do now intend to live separate and apart in the future whether or not a divorce shall be granted by either party against the other.

D. The parties desire to have an amicable settlement for all times of their past, present and future rights pertaining to property, support, estates,

alimony, costs, counsel fees and all other rights and obligations now or hereafter arising from, by reason of or out of the marriage relationship.

E. Each of the parties hereto has fully disclosed to the other all relevant facts and circumstances, including their respective assets and liabilities and income.

F. Each party hereto has carefully read and fully understands the terms of this Agreement and believes it to be fair, just, adequate and reasonable as to each of them.

NOW, THEREFORE, in consideration of the premises and mutual covenants, agreements and releases herein contained and intending to be legally bound, the parties hereto mutually covenant and agree as follows:

1. DIVORCE ACTION.

The parties agree to take all legal steps (including the timely and prompt submission of all documents and the taking of all actions) necessary to assure that a decree in divorce pursuant to Section 3301(d) of the Domestic Relations Code is entered as soon as possible in the action in divorce in Montgomery County captioned as Zabara v. Zabara, No. 84-17202.

2. EFFECT OF DIVORCE DECREE.

The parties agree that unless otherwise specifically provided herein, this Agreement shall continue

in full force and effect after such time as a final decree in divorce may be entered with respect to the parties.

3. AGREEMENT TO BE INCORPORATED IN DIVORCE DECREE.

A. The parties agree that a copy of this Agreement shall be incorporated, by reference, into a divorce judgment or decree, which may be entered with respect to them. This incorporation, however, shall not be regarded as a merger, it being the intent of the parties to permit this Agreement to survive any such judgment or decree. Notwithstanding anything in this paragraph that may be construed to the contrary, it is specifically intended that the terms and provisions of this Agreement not be subject to modification by the Court, except, and only except, in the event the Agreement specifically indicates otherwise.

B. The parties further agree that the Court of Common Pleas which may enter such a divorce decree shall retain continuing jurisdiction over the parties and the subject matter of the Agreement for the purpose of enforcement of any of the provisions thereof.

4. DEFINITIONS.

DATE OF EXECUTION.

The "date of execution" or "execution date" of this Agreement shall be defined as the date upon which it

is executed by the parties if they have each executed the Agreement on the same date. Otherwise, the "date of execution" or "execution date" of this Agreement shall be defined as the date of execution by the party last executing this Agreement.

5. ADVICE OF COUNSEL AND FULL DISCLOSURE.

The provisions of this Agreement and their legal effect have been fully explained to the parties by their respective counsel, Gerald J. Schorr, Esquire for Wife and Harry M. Byrne, Jr., Esquire for Husband. The parties acknowledge that they have received independent legal advice from counsel of their selection and that they fully understand the facts and have been fully informed as to their legal rights and obligations. They acknowledge and accept that this Agreement is, in the circumstances, fair and equitable and that it is being entered into freely and voluntarily, and that the execution of this Agreement is not the result of any duress or undue influence and that it is not the result of any collusion or improper or illegal agreement or agreements. The parties further acknowledge that they are each aware of the nature and extent of the assets and estate of the other, each having received full disclosure of said assets and estate of the other.

6. PERSONAL RIGHTS.

Wife and Husband may and shall, at all times hereafter, live separate and apart. They shall be free

from any control, restraint, interference or authority, direct or indirect, by the other in all respects as fully as if they were unmarried. They may reside at such place or places as they may select. Each may, for his or her separate use or benefit, conduct, carry on and engage in any business, occupation, profession or employment which to him or her may seem advisable. Wife and Husband shall not molest, harass, disturb or malign each other or the respective families of each other nor compel or attempt to compel the other to cohabit or dwell by any means or in any manner whatsoever with him or her. The parties are each entitled to the right of privacy in his or her respective residences.

7. MUTUAL RELEASES.

Husband and Wife hereby mutually remise, release, quitclaim and forever discharge the other and the estate of such other, for all time to come, and for all purposes whatsoever, of and from any and all rights, title and interests, or claims in or against the property (including income and gain from property hereafter accruing) of the other or against the estate of such other, of whatever nature and wheresoever situate, which he or she now has or at any time hereafter may have against such other, the estate of such other or any part thereof, whether arising out of any former acts, contracts, engagements or liabilities of such other or by way of dower or curtesy or claims in the nature of dower or curtesy or widow's or widower's rights, family exemption or similar allowance, or under the intestate laws, or the right to take

against the spouse's will; or the right to treat a lifetime conveyance by the other as testamentary, or all other rights of a surviving spouse to participate in a deceased spouse's estate, whether arising under the laws of (a) Pennsylvania, (b) any State, Commonwealth or territory of the United States, or (c) any other country; or any rights which either may have or at any time hereafter have for past, present or future support or maintenance, alimony, alimony pendente lite, equitable distribution, counsel fees, costs or expenses, whether arising as a result of the marital relationship or otherwise, including all economic rights and benefits under the Domestic Relations Code, its amendments and supplements, except, and only except, all rights and agreements and obligations of whatsoever nature arising or which may arise under this Agreement or for the breach of any provision thereof. It is the intention of Husband and Wife to give to each other by the execution of this Agreement, a full, complete and general release with respect to any and all property of any kind or nature, real, personal or mixed, which the other now owns or may hereafter acquire, except and only except all rights and agreements and obligations of whatsoever nature arising or which may arise under this Agreement or for the breach of any provision.

8. EQUITABLE DISTRIBUTION OF ASSETS

A. TANGIBLE PERSONAL PROPERTY.

1. Husband and Wife jointly own certain tangible personal property formerly located on the marital

premises, 317 Hedgerow Lane. Wyncote, Montgomery County, Pennsylvania (hereinafter the "Home"). Husband confirms that all of his right, title and interest in and to said tangible personal property is in Wife.

2. The parties agree that Wife is the sole and exclusive owner of a certain 1992 Dodge Shadow automobile, [and that Husband is the sole and exclusive owner or the 1985 Nissan Sentra.]

3. Each party hereby specifically waives, releases, renounces and forever abandons whatever claims, if any, he or she may have with respect to the items herein agreed to be that of the other party.

B. REAL ESTATE.

The parties own the Home as tenants by the entireties. ~~Simultaneously with~~ [Wife's counsel shall prepare a deed and immediately after] the execution of the Agreement. Husband shall execute and deliver a Deed for the Home, conveying, transferring and granting all of his right, title and interest in and to Home to Wife. Said Deed shall be delivered to Wife [immediately after] ~~upon~~ the Execution Date. Wife shall be solely responsible for and agrees to indemnify Husband and hold him harmless from all payments on the mortgage and late charges on the mortgage, real estate taxes and all other expenses relating to the Home from the ~~time that the Deed is released to Wife~~ [date of separation of the parties].

C. LUMP SUM PAYMENT TO WIFE.

1. Simultaneously with the execution of this Agreement, Husband agrees to pay Wife the cash sum of Thirty-Two, Thousand Eight Hundred Forty ($32,840) Dollars representing Thirty Thousand ($30,000) Dollars in monies owed in equitable distribution, and Two Thousand Eight Hundred Forty ($2,840) Dollars due in child support. [This payment will result in remitting of any arrears in the child support and APL account, and the ADL order shall also be vacated.]

2. It is clearly understood that these sums are in the nature of equitable distribution and are not deductible to Husband nor taxable to Wife for federal income tax purposes.

D. OTHER MARITAL ASSETS.

1. Except as provided hereunder, each of the parties shall retain his or her retirement plans, bank accounts, savings certificates, TIAA/CREF's and any other sole and separate property currently titled in his or her name.

2. Wife hereby specifically releases any and all right, title, interest, claim and demand whatsoever that she may now have or hereafter have to equitable distribution of patents nos. 531,955 (abandoned), 4,702,254, 4,867,164 and 5,025,807, except as may otherwise be provided hereunder.

3. Each of the parties hereby releases any and all right, title, interest, claim and demand whatsoever that he or she may now have or hereafter have to equitable distribution of the property of the marriage, whether real, personal, mixed or of any description whatsoever or wheresoever situated, except as otherwise provided hereunder.

9. ROYALTIES PAYMENTS TO WIFE

A. Husband has a License Agreement with Cyberonics, Inc., a Delaware corporation, having a principal place of business at 827 West Main Street, League City, Texas, attached hereto and incorporated herein as Exhibit "A" (hereinafter the "License Agreement"). Pursuant to the License Agreement, Husband currently receives royalties for certain patents. "Royalties" are defined for this Agreement as any and all payments made or owing and due to Husband under the License Agreement or any other agreement involving royalties on the patents. "Patents" shall include patent application no. 531,955 (abandoned) and patents no. 4,702,254, no. 4,867,164 and no. 5,025,807 exclusively. ~~Commencing~~ [Effective] the first day of the first month following the Execution Date and continuing the first day of each month thereafter, Husband shall pay to Wife twenty (20%) percent of the annual royalties ~~payable~~ [paid] under the License Agreement [minus 10% for Husband's expenses,] such payments to be made in twelve (12)

consecutive monthly installments per year (hereinafter the "Royalty Sum").* For example, if Thirty-Six Thousand ($36,000) Dollars in a given calendar year is payable in royalties, Husband shall pay to Wife Six Hundred ($600) Dollars per month, calculated as follows:

Step 1: ($36,000) (.2) = $7,200.00
~~Step 2: (7,200) (.1) = $ 720.00~~) [Step 2: 7,200 – 10% for expenses = 6,480]
Step [3]: $[6,480]
12 = $[540].00 [(five hundred and forty dollars]

B. The Royalty Sum shall continue to be paid, as calculated above, for so long as royalties are payable to Husband, or to his successor, heirs or assigns, pursuant to the License Agreement or any agreement involving royalties arising from the Patents.

C. Any adjustments to the royalties made pursuant to Section 4 of the Agreement shall be passed on to Wife. For example, if no royalties payments are made to Husband pursuant to Section 4(c), no payments shall be made to Wife. If the royalty amount increases, Wife's payment shall be increased proportionately in accordance with the formula set out in paragraph A above.

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* [If royalties payable to Husband are not paid to him, but a recovered or received by him at a later time, Wife shall receive her 20% share after any adjustment for legal fees and/or costs involved in recovering the royalties, and Husband shall provide proof of such adjustment.]

D. The Royalty Sum shall be deductible to Husband and taxable to Wife for federal income tax purposes. ~~It is specifically understood and agreed, however, that~~ [T]he Royalty Sum [is in the nature of alimony but] ~~is not "alimony" as defined in the Pennsylvania Domestic Relations Code and~~ shall not be subject to termination upon Wife's remarriage or cohabitation, nor be subject to modification for any reasons not specified herein.

E. The Royalty Sum shall be paid by Husband [directly to wife and, if necessary be enforceable] through the Montgomery County Domestic Relations Office under Case No. 35152[, or No. 84-17202, Court of Common Pleas of Montgomery County.] ~~and the parties shall enter into a Stipulation to that effect in the form attached hereto and made a part hereof as Exhibit "B".~~

F. On or before [February 28] ~~January 31st~~ of each year for such time as the License Agreement or any agreement involving royalties arising from the [foregoing P]atents is in effect., Husband shall provide Wife with the IRS Form 1099 which will have been, or will be, filed with the Internal Revenue Service, showing royalties paid for the preceding tax year, and the Schedule "E" from Husband's federal income tax return for the preceding tax year. [Husband will use his best efforts to provide] ~~and~~ an affidavit on the letterhead of Cyberonics, Inc. or any successor licensor, in which the president of Cyberonics, Inc. (or the chief executive officer of the successor entity), affirms and attests to the amount of

royalties paid to Husband in the preceding tax year. Husband shall provide Wife with a copy or copies of any amended IRS Form 1099s and Schedule Es that may be prepared, said copy or copies to be given to Wife within thirty (30) days of filing with the IRS.

G. It is understood and agreed that Wife shall have no independent property interest or rights with respect to the [foregoing] patents [and that she shall not directly communicate with any officer or employee of Cyberonics or any successor licensor, except to enforce rights under the agreement.]

H. Wife agrees to maintain [strict] confidentiality as to any and all information presently in her possession or to any information that may come into her possession with regard to the [foregoing P]atents and License Agreement, [including Forms 1099 and Schedule E,] and any other agreement involving royalties on the [foregoing P]atents to which Husband may become a party, except as she may need to use such information to enforce her rights under this Agreement. [Any violation of the confidentiality provisions of this Agreement by Wife shall be considered to be a breach of a material term of this Agreement and may subject her, without limited Husband's Remedies, to money damages and payment of counsel fees and costs.]

[*]I. The Royalty Sum shall not cease by reason of Wife's death, changed financial circumstances, Husband's death, retirement or disability, or any other reason except, and only except, the expiration of the License Agreement or any agreement involving royalties on the patents, and the complete cessation of payments of royalties. [In the event of Husband's death prior to the termination of the Royalty Sum, his estate shall make the payments as required.] In the event of Wife's death prior to the termination of the Royalty Sum, the Royalty Sum shall be paid to Wife's estate.

J. In the event the License Agreement is re-negotiated or amended in any manner, or Husband enters into another agreement involving royalties arising from the patents, a copy of said agreement shall be provided to Wife within ten (10) days of the execution thereof and Wife shall continue to receive her twenty (20%) percent share of the royalties in accordance with Section 9A above.

K. In the event Husband enters into an agreement to sell, [any of the foregoing P]atent or [P]atents or assign an interest therein, Husband shall immediately inform Wife thereof, in writing, and shall provide Wife with a copy of the agreement as promptly as possible but in no event later than fifteen (15) days

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* However, in the event that Husband accuses Wife of a violation of a confidentiality which is found to be without merit by a court, Husband may be subjected to payment of Wife's reasonable counsel fees and costs.

after its execution. The net proceeds from the sale of a [any of the foregoing] Patent or Patents or from an assignment of any interest or interests therein shall be divided eighty (80%) percent to Husband and twenty (20%) percent to Wife [which shall be taxable to Wife),] and Husband shall give Wife her twenty (20%) percent share immediately upon his or his representative's receipt of the net proceeds ("net proceeds") to be defined as the gross sales price less all expenses directly related to the sale or assignment).

10. WAIVER OF ALIMONY.

Each of the parties hereto specifically waives, releases and discharges any right that he or she may have to receive additional alimony, Alimony Pendente Lite, support, maintenance, counsel fees or costs pursuant to the Domestic Relations Code or otherwise.

11. WITHDRAWAL OF PENDING ACTIONS.

All petitions presently pending in the [divorce] support and APL actions shall be withdrawn immediately upon execution of the Agreement.

12. INCOME TAX PROVISIONS:

~~A. Prior Joint Returns. The parties filed joint federal and state income tax returns during the marriage. Husband and Wife agree that in the event~~

~~any deficiency in federal or state or local income tax is proposed, or any assessment of such tax is made against them by reason of her having joined in the filing of such joint return, Husband shall [illegible] for Wife and hold her harmless from any action or claim with regard to such liability including any counsel fees and costs incurred in defending any such action or claim.~~

B. ~~Husband's~~ Separate Returns: [The parties] filed separate federal and state income tax returns from 1985 through 1993. Husband and Wife agree that in the event any deficiency in federal, state, or local income taxes is proposed, or any assessment of such taxes is made against ~~Wife~~ [a party] by reason of ~~Husband~~ [the other party] having taken ~~the [illegible] personal exemptions~~ [an incorrect or disallowed reporting of income, exemptions or [illegible] for the years 1985 through 1993, ~~inclusive or [illegible] Husband having exemptions itemized deductions for real estate taxes and [illegible] interest on the material [illegible] in the year [illegible] reason of Husband having taken [illegible] for child support payments at any time by reason of [illegible] having filed [illegible]~~ [then the party having taken the incorrect position] shall indemnify ~~wife~~ and hold ~~her~~ [the other] harmless from any action or claim with respect to such liability, including any [reasonable] counsel fees and costs incurred in defending any such action or claim. [This paragraph is not an admission that any such incorrect [illegible] of income or deductions occurred.

~~C. Wife shall be entitled to take the children as personal exemptions for federal income tax dependents as long as she is legally permitted to do so and Husband shall not take them as dependents.~~

13. WARRANTY AS TO EXISTING OBLIGATIONS.

Each party represents that he or she has not heretofore incurred or contracted any debt, liability or obligations for which the other or the estate of the other party may be responsible or liable, except as may be provided for in this Agreement. Each party agrees to indemnify or hold the other party harmless from and against any and all such debts, liabilities or obligations of every kind which may have heretofore been incurred by them, including those for necessities, except for the obligations arising out of this Agreement.

14. WARRANTY AS TO FUTURE OBLIGATIONS.

Wife and Husband each covenant, warrant, represent and agree that each will now and at all times hereafter save harmless and keep the other and the estate of the other indemnified from all debts, charges and liabilities incurred by either of them after the execution date of this Agreement, except as may be otherwise specifically provided for by the terms of this Agreement and that neither of them shall hereafter incur any liability whatsoever for which the estate of the other may be liable.

15. FINANCIAL DISCLOSURE.

~~Attached hereto as~~ Exhibits ["B" and "C"], are the financial disclosures of the parties as of June 30, 1993, with respect to their sole and joint assets, liabilities and income. Each party confirms that he or she is relying upon the substantial accuracy of the financial disclosure as an inducement to the execution of the Agreement.[They shall be produced within 10 days of the date of this Agreement, and attached hereto and incorporated herein.] No representations or warranties have been made by either party to the other, or by anyone else, as to financial status of the other, except as expressly set forth in this Agreement and Exhibits ["B" & "C".]

16. WAIVER OF MODIFICATION TO BE IN WRITING.

No modification or waiver of any of the terms hereof shall be valid unless in writing and signed by both parties and no waiver of any breach hereof or default hereunder shall be deemed a waiver of any subsequent default of the same or similar nature.

17. MUTUAL COOPERATION.

Each party shall, at any time and from time to time hereafter, take any and all steps and execute, acknowledge and deliver to the other party any and all further instruments and/or documents that the other party may reasonably require for the purpose of

giving full force and effect to the provisions of this Agreement.

18. LAW OF PENNSYLVANIA APPLICABLE.

This Agreement shall be construed in accordance with the laws of the Commonwealth of Pennsylvania.

19. AGREEMENT BINDING ON HEIRS.

This Agreement shall be binding and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and assigns.

20. INTEGRATION

This Agreement constitutes the entire understanding of the parties and supersedes any and all prior agreements and negotiations between them. There are no representations or warranties other than those expressly set forth herein.

21. NO WAIVER OF DEFAULT.

This Agreement shall remain in full force and effect unless and until terminated under and pursuant to the terms of this Agreement. The failure of either party to insist upon strict performance of any of the provisions of this Agreement shall in no way affect the right of such party hereafter to enforce the same, nor shall the waiver of any breach of any provisions hereof be construed as a waiver of any

subsequent default of the same or similar nature, nor shall it be construed as a waiver of strict performance of any other obligations herein.

22. SEVERABILITY

If for any reason whatsoever any part of this Agreement shall be declared void or invalid by operation of law or otherwise, only such a part shall be void and this Agreement shall remain in all other respects valid and enforceable.

23. HEADINGS FOR REFERENCE ONLY.

The headings preceding the text of the several sections hereof are inserted for the convenience of reference, and shall not affect the meaning, construction, scope or effect of this Agreement.

24. CONTRACT INTERPRETATION.

For purposes of contract interpretation and for the purpose of resolving any ambiguity herein, Husband and Wife agree that this Agreement was prepared jointly by their respective attorneys. Each of the parties has carefully read and has fully considered this Agreement and all of the statements, terms, conditions and provisions thereof prior to signing below.

25. BREACH.

It is expressly understood and agreed by and between the parties hereto that this Agreement may

be specifically enforced by either Husband or Wife in a Court of Equity, and the parties hereto agree that if an action to enforce this Agreement is brought in Equity by either party, the other party will make no objection on the alleged ground of lack of jurisdiction of said court on the ground that there is an adequate remedy at law. The parties do not intend or purport hereto to improperly confer jurisdiction on a Court in Equity by their agreement, but they agree as provided herein for the forum of equity in mutual recognition of the present state of the law, and in recognition of the general jurisdiction of courts in equity over agreements such as this one.

Notwithstanding anything to the contrary herein, Husband and Wife may also proceed with an action at law for redress of any of his or her rights under the terms of this Agreement. In the event that, for any reason whatsoever, either party is obliged to proceed at law for redress of his or her rights under the terms of this Agreement, then it is specifically understood and agreed that for and in consideration of the other provisions and covenants of this Agreement, each shall waive any right to jury trial so as to expedite the hearing and disposition or such case and so as to avoid delay.

All remedies provided by law and all remedies provided for in this Agreement for enforcement of this Agreement shall be deemed to be cumulative and the exercise of one remedy shall not bar or prevent the pursuit of any other remedy and either party may elect to pursue such remedies simultaneously and the

exercise of a remedy one or more times shall not exhaust its use or prevent further pursuit of such remedy.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

WITNESSES:

/s/ [Illegible] /s/ Elizabeth Omand
ELIZABETH OMAND

/s/ [Illegible] /s/ Joseph Zabara
JACOB ZABARA 2-2-94

APPENDIX I

FELL & SPALDING **Attorney for Plaintiff**
By: Stephen R. Bolden, Esquire
I.D. No.: 11951
2230 Land Title Building
100 South Broad Street
Philadelphia, PA 19110
(215) 563-6161

Jacob Zabara 300 South Point Drive, Apt. 2002 Miami Beach, FL 33139 Plaintiff v. Harry M. Byrne, Jr. Three Bala Plaza E, Suite 606 Bala Cynwyd, PA 19004 and Blank Rome LLP, *previously known as* Blank Rome Comisky & McCauley One Logan Square Philadelphia, PA 19004 Defendants	COURT OF COMMON PLEAS PHILADELPHIA COUNTY December Term, 2006 No.: 000605 JURY TRIAL DEMANDED

CIVIL ACTION COMPLAINT

Parties

1. Plaintiff, Jacob Zabara, is a citizen of the state of Florida residing at the address above stated.

2. Defendant, Harry M. Byrne, Jr., is an attorney duly admitted to practice law in the Commonwealth of Pennsylvania who at the times referred to hereinafter below was an associate or partner of the defendant law firm acting within the course and scope of his employment, or within the course and scope of his position as a partner in the firm.

3. Defendant, Blank Rome LLP, previously known as Blank Rome Comisky & McCauley, is a law firm with its main office located in Philadelphia, PA at the address above stated.

Jurisdiction and Venue

4. This court has jurisdiction over the parties and over the subject matter of this cause of action. Venue is proper pursuant to Pa.R.C.P. Rule 1006(b)(c) and Rule 2130(a) in that defendant, Blank Rome regularly conducts business in Philadelphia County, and transactions or occurrences which are the subject matter of this cause of action arose in Philadelphia County.

Operative Facts

5. Plaintiff and Elizabeth Omand were married on January 27, 1970 and finally separated on July 1, 1984. On February 4, 1994, the Court of Common Pleas of Montgomery County granted to Ms. Omand a divorce.

6. On September 14, 1983, ten months before the final separation, plaintiff applied for a patent describing a method to control involuntary movements by patients afflicted with epilepsy and other disorders.

7. This patent was subsequently abandoned by plaintiff after the parties finally separated because plaintiff concluded that the technology and methodology it described, did not accomplish the purpose for which the patent was intended and because the patent office had rejected several of the claims in plaintiff's patent application.

8. Following the final separation of the parties plaintiff applied for the following three patents:

a. Patent Number 4,702,254 (hereinafter the "254 Patent") filed on December 30, 1985 (more than two years after the final separation) and granted by the United States Patent Office on October 27, 1987;

b. Patent Number 4,867,164 (hereinafter the "164 Patent") filed on October 26, 1987 (almost four years after the final separation) and granted by the United States Patent Office on September 1989; and,

c. Patent Number 5,025,807 (hereinafter the "807 Patent") filed on January 25, 1989 (more than five years after the final separation) and granted by the

United States Patent Office on June 25, 1991.

9. On March 15, 1988 (more than four years after the final separation) plaintiff entered into a "License Agreement" with Cyberonics, Inc. under which plaintiff licensed Cyberonics to use his patents and any subsequent patents he invented for the purpose of developing, manufacturing and marketing an implantable device to be used to control epileptic seizures as well as any other patents in the field of nerve stimulation. ***(A true and correct copy of said License Agreement is attached hereto as Exhibit 1.)***

10. In exchange for granting to Cyberonics his interest in the patents in question and subsequent patents, Cyberonics agreed to pay to plaintiff royalty income based upon the number of implantable devices sold in the United States and foreign markets.

11. Under this Agreement, plaintiff was obligated to work for Cyberonics as a consultant for a period of two years without pay and to assign to it all of his know-how and technology in respect to the development of the implantable device.

12. The License Agreement in question contained the following provision:

> ***Only one royalty shall be payable on a Product at the applicable percentile rate specified in Section 4(a) or 4(b), as the case may be, regardless of the number of Licensed Patents or use of Technology***

under which such Product has been manufactured, used or sold.
(License Agreement, Paragraph 4(g), page 8)

13. Starting in approximately 1990 and continuing down until 1996, defendant Byrne, while he was employed as an associate, or as a partner in the defendant law firm, represented plaintiff in divorce and support proceedings instituted by plaintiff's wife in the Court of Common Pleas of Montgomery County.

14. On February 2, 1994 plaintiff and his wife, Elizabeth Omand, entered into a Property Settlement Agreement titled, "Agreement Between Elizabeth Omand and Jacob Zabara." ***(A true and correct copy of said Agreement is attached hereto as Exhibit 2.)***

15. Plaintiff executed this Agreement acting on the advice of his attorney, defendant Byrne. It granted to Ms. Omand an interest in and right to receive a percentage amount of the royalties that plaintiff would receive on the 254 Patent, the 164 Patent, the 897 Patent and the abandoned patent 531,955.

16. Under the Property Settlement Agreement Ms. Omand was entitled to receive 20% of the royalty income generated by the three patents in question less 10% of that 20% figure, or an average of 18% for plaintiff's expenses.

17. The language of the Agreement limited the right of Ms. Omand to receive royalties exclusively to

the aforesaid described patents. Specifically, the Agreement said,

> ***"Patent" shall include patent application no. 531,955 (abandoned) and patents no. 4,702,254, no. 4,867,164 and no. 5,025,807 exclusively.***
> ***(Property Settlement Agreement, Paragraph 9(a), page 8)***

18. As of February 2, 1994 when the Property Settlement Agreement was executed by plaintiff and his former wife, plaintiff held at least 24 patents. Six patents were assigned to Cyberonics, Inc. which were directly used in conjunction with the three patents identified in the Property Settlement Agreement, in order to manufacture the implantable device in question.

19. The Property Settlement Agreement refers to the License Agreement and makes that Agreement an exhibit to the aforesaid Property Settlement Agreement.

20. In 1990 or 1991 Cyberonics began to implant the device in volunteer patients and in 1997 it received final approval from the Food and Drug Administration (FDA) for the purpose of marketing the implantable device.

21. Following the FDA approval and marketing of the device in question, plaintiff started to receive substantial royalties because of the sale of the device for its intended use.

22. Under the License Agreement which was executed before any product had been approved by the FDA or sold to the public, plaintiff was entitled to a minimum royalty in the amount of $36,000 per year. This figure of $36,000 per year was used in the Property Settlement Agreement to reflect a basis for calculating the percentage share of royalty that plaintiff's wife would receive. For each year following execution of the agreement plaintiff paid to his former wife 20% of this minimum royalty amount.

23. In 2004 plaintiffs former wife filed a Petition against plaintiff claiming that he had failed to properly pay her the share of royalty income to which she was entitled pursuant to the terms of the Property Settlement Agreement.

24. On December 9, 2004, Judge Rhonda Lee Daniele, who was assigned to hear this Petition, verbally ordered plaintiff to produce any existing document with regard to royalty income he received from patents other than the three patents described in the Property Settlement Agreement.

25. Judge Daniele followed this verbal order from the bench with a written order dated January 7, 2005 which required plaintiff to produce documentary evidence that separated royalty income he received from the three patents described in the Property Settlement Agreement as distinguished from royalty income he received because of other patents.

26. Judge Daniele further made clear to plaintiff's counsel in these proceedings that if he could not

produce such documentary evidence, she would infer that all royalty income received by plaintiff down through the years was based solely upon the three patents described in the Property Settlement Agreement.

27. Because no such document existed, Judge Daniele made the inference that all royalty income received by plaintiff down through the years would be presumed to have been based upon the three patents described in the Property Settlement Agreement.

28. In a written Opinion and Order dated April 18, 2005, Judge Daniele attributed all royalty income to the three patents in question, and issued an order requiring plaintiff to pay Ms. Omand the sum of $2,491,059 as her share of the royalties; interest from 2000 through 2003 in the sum of $299,515; attorney's fees in the some of $15,000; and an additional $10,903 per month in interest for each and every month that the above described royalty payments were made after March 31, 2005. ***(A copy of Judge Daniele's Opinion and Order dated April 18, 2005 is attached hereto as Exhibit 3.)***

29. Plaintiff has sent to counsel for his former wife checks in the amount of the funds Judge Daniele ordered him to pay in her Opinion and Order dated April 18, 2005.

30. Thereafter, plaintiff, through his counsel, appealed Judge Daniele's Order to the Superior Court of Pennsylvania.

31. Judge Daniele further ordered plaintiff to post a one million, nine hundred and fifty thousand dollar ($1,950,000) bond to cover the royalties that would in all likelihood accrue between the time of filing the appeal and the ultimate conclusion of the appellate proceedings. The cost of this bond to plaintiff is in the sum of $40,000 a year.

32. In an Opinion and Order filed by a Superior Court Panel on June 16, 2006 it upheld Judge Daniele's Order with the exception that it modified the starting date for the payment of the royalties from February 9, 2000 to August 9, 2000 because of the four year statute of limitations. ***(A copy of Superior Court's Opinion and Order dated June 16, 2006 is attached hereto as Exhibit 4).***

33. Plaintiff subsequently filed a Petition for leave to appeal with the Supreme Court of Pennsylvania which as of this date remains undecided.

34. Two of the three patents (the "254 Patent" and the "807 Patent" have expired). The "164 Patent" would have expired in 2004, but was extended and therefore will not expire until 2011. Therefore plaintiff's obligation to pay royalties to his wife based on Judge Daniele's decision which attributed all royalty income to the existing patent, will continue on to that date, 2011, five years from the present time.

35. Based upon the history of the sales of the implantable device in question from the present time until the expiration of the last patent in 2011, it is believed that the amount of money plaintiff will be

required to pay his former wife in royalty income because of Judge Daniele's Order will exceed $4 million.

36. In 1991, plaintiff and a Cyberonics employee applied for a patent on a method for treating depression through the use of nerve stimulation which was granted by the United States Patent Office on April 5, 1994. The patent number 5,299,569.

37. The FDA has approved of the use of this implantable device for the treatment of depression and its sale by Cyberonics for that purpose.

38. It is believed that the sales generated by this device will be in the multimillion dollar figure range.

39. Following the issuance of Judge Daniele's decision, plaintiff's former wife filed another Petition in July of 2005, as yet undecided because of the pending appeal of her decision. This Petition seeks to include royalty income from the sale of the implantable device for treating depression.

40. Plaintiff did not become aware of, did not realize, and had no reasonable basis for understanding that he may have been harmed by the representation he received from defendants until February 24, 2005.

41. It was on that date, the day of the hearing before Judge Daniele, when plaintiff realized that she would in all likelihood draw the inference that all royalty income over the years was attributable to the

three patents in question because of his inability to produce a non-existent document which separated the value of the three patents identified in the Property Settlement Agreement from the value of the other patents to produce the implantable device.

42. Plaintiff thereafter began an investigation to determine if defendants had failed to properly represent him in the preparation and execution of the Property Settlement Agreement.

43. During the course of this investigation, Plaintiff for the first time, realized that defendants' malpractice may not have been limited to failing to provide a method for separating the value of the three patents identified in the Property Settlement Agreement from all other patents used in the manufacturer of the implantable device.

44. It was at this time that plaintiff also became aware for the first time that defendants may have committed malpractice by advising plaintiff that he should agree to treat the three patents identified in the Property Settlement Agreement as marital property and negotiate to give to his wife a percentage share of the royalty income generated by those three patents.

Count 1
Negligent Treatment of Post Separation Patents as Marital Property

45. Plaintiff incorporates herein by reference thereto the allegations of paragraphs 1-44 above.

46. The Pennsylvania Divorce Code requires equitable distribution of marital property.

47. The Divorce Code in defining "marital property" specifically excludes from that definition:

> ***Property acquired after final separation until the date of divorce, except for property acquired in exchange for marital assets.***
> ***(23 Pa. C.S.A. § 3501(a)(4)).***

48. The abandoned patent which was applied for prior to final separation was abandoned because the technology and methodology which plaintiff envisioned in that patent application did not accomplish in a satisfactory manner its intended purpose in controlling epileptic seizures, and many of the claims in that abandoned patent had been rejected by the patent office.

49. The patents applied for by plaintiff after final separation, and granted by the United States Patent Office after final separation, used a different technology and methodology for the purpose of controlling epileptic seizures.

50. The abandoned patent was of no value and was not used to acquire the post-separation patents in question.

51. Defendant Byrne advised plaintiff to agree to include the post-separation patents in the Property Settlement Agreement, based on Byrne's assertion that there was likelihood that these patents would be determined by the court to be marital property.

52. It is believed and therefore averred that Byrnes failed to retain competent patent counsel to advise him on whether the abandoned patent application, served as a valid basis for including the post-separation patents as marital property.

53. Advice from competent patent counsel would have established that the abandoned patent application did not constitute any substantial basis for including the post-separation patents as marital property.

54. It is averred that defendant Byrnes was negligent in his representation of plaintiff in that:

a. He failed to obtain competent advice on a legal matter outside of his field of practice when he advised plaintiff to agree to include the patents in question in the Property Settlement Agreement and the negotiations with respect thereto.

b. He failed to conduct that measure of research sufficient to allow him to properly

advise plaintiff and to allow plaintiff to make an informed decision.

c. He failed to be familiar with principles of law and rules of practice which were of frequent application in the ordinary business of his profession.

d. He failed to exercise the ordinary skill and knowledge that an attorney representing plaintiff under similar circumstances should have exercised and employed when so doing.

55. As a direct and proximate result of the negligence of defendant as set forth above, plaintiff suffered an actual loss in an amount equal to all of the royalty income that he has been ordered to pay to his former wife in the past and down through the future until the last patent expires in 2011.

56. As a further direct and proximate result of the negligence in question, plaintiff may suffer an actual loss in payment of royalty income to his former wife for the sale of an implantable device to treat depression.

57. As a further direct and proximate result of the negligence in question, plaintiff has suffered a loss in amount equal to the cost of posting the $2 million bond ordered by Judge Daniele for as long as the appellate proceedings continue on.

58. It is averred that the defendant Blank Rome is liable for the negligence of Byrne who was an employed associate or partner in that film acting

within the course and scope of his employment as an associate or partner when committing the negligent acts in question.

WHEREFORE, plaintiff demands judgment against defendants on this Count 1 of the Complaint in such amount in excess of the $50,000 jurisdictional limit for Compulsory Arbitration as a jury finds in order to compensate him for the loss in question.

Count 2
Breach of Contract

59. Plaintiff incorporates herein by reference hereto the allegations of paragraphs 1-58 above.

60. Defendant Byrne, in representing plaintiff pursuant to the contract entered into between plaintiff and defendant Byrne and the law firm of Blank Rome, impliedly agreed to provide plaintiff with professional service consistent with those expected of the profession at-large.

61. It is averred that defendant Byrne in advising plaintiff to agree to include in the Property Settlement Agreement with his former wife the three post-separation patents breached his obligation to provide plaintiff with the professional services plaintiff had the right to expect and which were consistent with those expected of the profession at-large.

62. Defendant Blank Rome is liable for the breach of contract committed by defendant Bryne who was an associate or partner in that law firm acting

within the course and scope of his position with said firm.

63. As a direct and proximate result of the breach of contract in question. Plaintiff suffered an actual loss in an amount equal to all of the royalty income that he has been ordered to pay to plaintiff in the past and down through the future until the last patent expires in 2011.

WHEREFORE, plaintiff demands judgment against defendants on this Count 2 of the Complaint in such amount in excess of the $50,000 jurisdictional limit for Compulsory Arbitration as a jury finds in order to compensate him for the loss in question.

Count 3
Negligence in Failing to Allocate Between Patents Identified in Property Settlement Agreements and Other Patents

64. Plaintiff incorporates herein by reference thereto the allegations of paragraphs 1-63 above.

65. Alternatively, it is averred that defendant Bryne either failed to read the License Agreement in question even though it was an exhibit to the Property Settlement Agreement, or failed to recognize the need to negotiate into the Property Settlement Agreement a method for setting a value solely for the three patents described in that Agreement as distinguished from other patents either used in manufacturing the implantable device in question for

controlling epileptic seizures or for other future purposes in the field of nerve stimulation, including the treatment of depression.

66. It is averred that defendant Byrnes was negligent in his representation of plaintiff in that:

a. He failed to negotiate for and include in the property settlement agreement a method for allocating, and limiting his wife's right to receive royalty income to the three patents set forth in the Property Settlement Agreement;

b. He failed to obtain competent advice on a legal matter outside of his field of practice when he failed to negotiate and include in the Property Settlement Agreement a method for valuing the three patents identified in this Agreement separate from other patents used in manufacturing the implantable device in question to control epileptic seizures, or for other purposes in the field of nerve stimulation, including the treatment of depression.

c. He failed to conduct that measure of research sufficient to allow him to properly advise plaintiff and to allow plaintiff to make an informed decision.

d. He failed to be familiar with principles of law and rules of practice which were of frequent application in the ordinary business of his profession.

e. He failed to exercise the ordinary skill and knowledge that an attorney representing plaintiff under similar circumstances should have exercised and employed when so doing.

f. He failed to scrutinize the License Agreement of Property Settlement Agreement the plaintiff was to execute and failed to disclose to the plaintiff the full import of those Agreements and the possible consequences which would arise from executing the Property Settlement Agreement without including a method for valuing the three patents identified in that Agreement separate from other patents used in manufacturing the implantable device for treatment of epilepsy, or other patents used for other purposes in the future, in the field of nerve stimulation, including the treatment of depression.

67. Defendant Blank Rome is liable for the negligence committed by defendant Bryne who was an associate or partner in that law firm acting within the course and scope of his position with said firm.

68. As a direct and proximate result of the negligence in question, Plaintiff suffered an actual loss in an amount equal to all of the royalty income that he has been Ordered to pay to his former wife in the past, and down through the future until the last Patent expires in 2011 which he should not have been

required to include in the royalty payments because of the negligence in question.

69. As a further direct and proximate result of the negligence in question, plaintiff may suffer an actual loss in payment of royalty income to his former wife for the sale of an implantable device to treat depression.

70. As a further direct and proximate result of the negligence in question, plaintiff has suffered a loss in amount equal to the cost of posting the $2 million bond ordered by Judge Daniele for as long as the appellate proceedings continue on.

WHEREFORE, plaintiff demands judgment against defendants on this Count 3 of the Complaint in such amount in excess of the $50,000 jurisdictional limit for Compulsory Arbitration as a jury finds in order to compensate him for the loss in question.

Count 4
Breach of Contract

71. Plaintiff incorporates herein by reference hereto the allegations of paragraphs 1-70 above.

72. Defendant Byrne agreed in representing plaintiff pursuant to the contract entered into between plaintiff and defendant Byrne and the law firm of Blank Rome that Bryne and his law firm impliedly agreed to provide plaintiff with professional service consistent with those expected of the profession at-large.

73. It is averred that defendant Byrne in failing to negotiate into the Property Settlement Agreement a method for valuing the three patents identified therein separate and apart from other patents used in manufacturing the implantable device breached his obligation to provide plaintiff with the professional services plaintiff had the right to expect and which were consistent with those expected of the profession at-large.

74. Defendant Blank Rome is liable for the breach of contract committed by defendant Bryne who was an associate or partner in that law firm acting within the course and scope of his position with said firm.

75. As a direct and proximate result of the breach of contract in question in question, Plaintiff suffered an actual loss in an amount equal to the royalty income that he has been ordered to pay his former wife in the past and down through the future until the last patent expires in 2011.

76. As a further direct and proximate result of the breach of contract in question, plaintiff may suffer an actual loss in payment of royalty income to his former wife for the sale of an implantable device to treat depression.

WHEREFORE, plaintiff demands judgment against defendants on this Count 4 of the Complaint in such amount in excess of the $50,000 jurisdictional

limit for Compulsory Arbitration as a jury finds in order to compensate him for the loss in question.

Date: _____ Fell & Spalding

BY: _____
STEPHEN R. BOLDEN, ESQ.
2230 Land Title Building
100 S. Broad Street
Philadelphia, PA 19110
(215) 563-6161
ATTORNEYS FOR PLAINTIFF

VERIFICATION

I, Jacob Zabara, hereby certify that I am the Plaintiff in this action, and I verify that the facts set forth in the foregoing Civil Action Complaint are true and correct to the best of my knowledge, information and belief. This Verification is given pursuant to the provisions of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.

Date: _____ _____
Jacob Zabara